IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 14, 2005 Session

MYRNA WHITE, ET AL. v. TUCKER SMITH, ET AL.

Appeal from the Circuit Court for Bradley County
No. V-01-1061 John B. Hagler, Jr., Judge

No. E2004-02467-COA-R3-CV - FILED MAY 19, 2005

Myrna G. White ("Ms. White") was taking a walk on a public road when she was bitten by a dog allegedly owned by Tucker and Lisa Smith ("Defendants"). Ms. White and her husband, James T. White ("Mr. White"), filed this suit alleging several causes of action, including negligence *per se*. The negligence *per se* claim was predicated upon a violation of Tenn. Code Ann. § 44-8-408, which makes it unlawful for a dog owner to allow his or her dog to run at large. After a trial, the Trial Court made several factual findings which established negligence by Defendants. However, the Trial Court went on to conclude that pursuant to Tenn. Code Ann. § 44-8-408, Defendants were liable to Plaintiffs because their dog was at large when it attacked Ms. White, regardless of whether Defendants were negligent or had exercised reasonable care. Plaintiffs established that Defendants were negligent by allowing their dog to run at large from time to time. Therefore, we affirm the judgment of the Trial Court and decline to decide whether a dog owner may be held strictly liable for a violation of Tenn. Code Ann. § 44-8-408 without any finding of negligence.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

B. Prince Miller, Jr., Cleveland, Tennessee, for the Appellants Tucker and Lisa Smith.

James F. Logan, Jr., Cleveland, Tennessee, for the Appellees Myrna and James White.

OPINION

Background

This is a dog bite case. Plaintiffs filed this lawsuit against Defendants, whom they claim owned a "large dog, which was of a ferocious, vicious and mischievous disposition." According to the complaint, on February 4, 1999, Ms. White was walking past Defendants' house when she was attacked by Defendants' dog. Plaintiffs alleged that Defendants were aware of their dog's disposition but, nevertheless, "allowed the dog to go at large without being properly restrained, guarded or enclosed in any protective fencing." Plaintiffs claimed Defendants were liable to Ms. White for compensatory damages as a result of their negligence, negligence *per se*, and/or gross negligence. Mr. White brought a claim for loss of consortium.

The negligence *per se* claim was based on an alleged violation of Tenn. Code Ann. § 44-8-408, which was originally enacted in 1901. Excluding various exceptions not applicable here, this statute provides:

> **Dogs not allowed at large – Exception. –** It is unlawful for any person to allow a dog belonging to or under the control of such person, or that may be habitually found on premises occupied by the person, or immediately under the control of such person, to go upon the premises of another, or upon a highway or upon a public road or street ….

Pursuant to Tenn. Code Ann. § 44-8-409, a violation of the foregoing statute is punishable as a Class C misdemeanor.

Defendants answered the complaint and generally denied any liability to the Whites. Defendants denied their dog had a vicious or ferocious propensity or that it was at large on the day Ms. White claims to have been attacked. Defendants further alleged that if Ms. White was in fact attacked by an animal, "she was guilty of comparative fault and/or negligence which was the sole and proximate cause of any injuries she sustained."

After Defendants' motion for summary judgment was denied by the Trial Court, the non-jury case proceeded to trial with Ms. White being the first witness. Ms. White testified that she usually goes for a walk five days a week after returning home from work. Whenever she walked by Defendants' house in the past, Defendants' dog was inside a fence. "Otherwise, I wouldn't have been walking by there." Ms. White claimed, however, that on the day she was attacked Defendants' dog was outside the fence and with another dog. According to Ms. White, "the two dogs came and they followed me, just maybe a step or two when they got to me, and one dog bit me. And that was [Defendants'] dog." Using a photograph that was taken a couple of days after the incident, Ms. White identified Defendants' dog and stated that was the dog that bit her. Ms. White also identified a picture of Defendants' gate and a sign on that gate which reads "Beware of Dog". Ms. White

testified that even though the dog was fenced in when she walked by Defendants' house on previous occasions, the dog would "run the fence...[and] [a]cted viciously, like it wanted to jump the fence and attack." Ms. White claimed the only reason she was "brave" enough to continue walking by Defendants' house was because the gate always had been closed.

Ms. White testified that she was bitten on her private parts between her rectum and vagina. Ms. White explained that she was unable to go anywhere, including work, for five full weeks after she was attacked. She also had to go to the doctor two or three times each week. At the time of trial, Ms. White still was experiencing pain from the dog bite and had difficulty sitting for long periods of time. Ms. White is employed as a package engineering technician for Schering-Plough. Ms. White was working full-time and earning approximately $588 per week in February of 1999. Although there was a factual dispute regarding whether Defendants' dog was the dog that attacked Ms. White, the parties were able to stipulate that Ms. White incurred reasonable medical expenses of $3,124.03 as a direct result of the dog bite.

On cross-examination, Ms. White testified that the Newmans live next door to Defendants and the Newmans also owned a dog. Ms. White admitted making several complaints about the Newmans' dog running loose, but she never made any such complaints about Defendants' dog. Ms. White stated that she was bitten while she was standing on the road and denied telling a police officer that she had been bitten while on her own property. Ms. White also denied telling a police officer that she was bitten by a rottweiler.

The next witness was Mr. White who testified that when his wife returned home after being attacked by the dog, she told him to get a piece of plastic to cover the car seat because she was bleeding and then to take her to the hospital. Mr. White stated that when he and his wife were ready to leave for the hospital, he noticed Defendants' labrador retriever[1] was in the Whites' backyard. Mr. White described the dog bite as "really bad." Mr. White had to take on several additional chores around the house because his wife was unable to assist due to her physical injuries. On cross-examination, Mr. White acknowledged that, prior to his wife being bitten, he had never seen Defendants' dog running loose and never heard anyone complain about Defendants' dog being vicious.

Ms. Varnell Cook was called as a witness by Plaintiffs. Ms. Cook lives close to the parties and testified that she has seen Defendants' labrador retriever running loose on several occasions. Ms. Cook further stated that a few times she has walked by Defendants' house and their dog "would be running the fence and just snapping at you. And I said [to myself], that dog would hurt you if it gets out." While Ms. Cook admitted that she never complained to Defendants about their dog running loose, she added that her now deceased husband had made such complaints.

[1] Throughout the trial, Defendants' dog was referred to interchangeably as a golden retriever, a yellow labrador retriever, a golden labrador retriever, etc. For the sake of clarity we will refer to the dog as a labrador retriever regardless of the particular description used by the witnesses during their testimony.

Defendants' first witness was officer Jerry Nye ("Nye"), a deputy sheriff with the Bradley County Sheriff's Department. Nye responded to a telephone call made by Plaintiffs concerning a dog bite. According to Nye, Ms. White stated at the hospital during his interview of her that she had been attacked by a rottweiler and that it was Defendants' dog that had attacked her. Nye also testified that Ms. White told him the dog bite occurred while she was standing at the edge of her own property. After leaving the hospital, Nye proceeded to Defendants' residence and noticed a yellow labrador retriever, not a rottweiler. Nye wrote on the incident report that Ms. White had been bitten by a labrador retriever because that was the type of dog Defendants actually owned and Ms. White said she was bitten by Defendants' dog. Nye called Ms. White several days later to discuss the discrepancy between her statement at the hospital that she had been bitten by a rottweiler and the fact that Defendants actually owned a labrador retriever. Ms. White insisted during this conversation that it was Defendants' dog which had attacked her. Because of the discrepancy in the type of dog which attacked Ms. White, Nye did not pursue having criminal charges brought against Defendants. Nye further testified that there is a neighborhood only a "short distance" from where Ms. White claims she was attacked and in that neighborhood there have been several complaints about rottweilers running loose.

Defendant Lisa Smith ("Ms. Smith") testified that her yard has been fenced in for over fourteen years. Ms. Smith stated that although she and her husband owned a rottweiler in the past, they currently have a labrador retriever named Jake who was about a year old when Ms. White claims she was bitten. According to Ms. Smith, if she is leaving the house for less than an hour she will leave Jake in the garage so she can leave the gate open. She would never simply open the gate and allow Jake to run at large. Ms. Smith maintained that she has never had any complaints from anyone about Jake being a problem. Jake is the family pet and is very good with the two children. Ms. Smith acknowledged that when someone walks by the fence, Jake runs next to the fence and barks. Ms. Smith agreed that she had no reason to question Ms. White's ability to recognize Jake as being Defendants' dog. However, Ms. Smith added that there is someone else in the neighborhood who also has a yellow labrador retriever and at times that dog runs at large. There also are two rottweilers whose owners live about a half mile from Ms. Smith and she has seen these dogs running at large several times.

Ms. Smith testified that on the day of the incident at issue, she left her residence with her two children, closed the gate, and secured the gate with a bungy cord. Jake was in the yard when she left. When she returned, the gate still was closed, still was secured with the bungy cord, and Jake still was in the yard.

Mr. Smith was the next witness, and he testified that he returned home at 7:30 p.m. on the day in question and his wife was not yet home. When he arrived, the gate was closed and Jake was in the yard standing by the garage door. Mr. Smith was unaware that there had been any type of an incident until the police arrived approximately thirty minutes later. According to Mr. Smith, he never had any problems with Jake. He does not allow Jake to run at large and Jake is kept inside the fence at all times. Mr. Smith stated that he has never had any complaints about Jake being aggressive although he has observed Jake running along the fence and barking when people walk by

the house. Mr. Smith added that he has never seen anybody scared by Jake and pointed out that the "meter man" opens the gate and comes inside the fence to read the meter.

The final witness was Shannon Newman ("Newman"), who was called by Plaintiffs as a rebuttal witness. As noted previously, Newman is Defendants' next door neighbor. According to Newman, his dog and Jake are "basically inseparable." Newman's dog is somewhat smaller than Jake and there is a place in Defendants' fence where Newman's dog can crawl through the fence in order to play with Jake. Newman testified that on the day of the incident, he left his house about 6:30 or 7:00 p.m. to get a pizza from Gondolier. When Newman left to get the pizza, Jake was outside of Defendants' fenced in yard and was "laying down beside my driveway. Both dogs were." Jake still was outside the fence when Newman returned home with the pizza. Newman does not know how Jake got back inside the fence prior to Defendants returning home. Newman stated that he did not return Jake to the yard, but he did call Defendants and left them a message telling them what allegedly had happened.

When the presentation of evidence was concluded, the Trial Court announced its decision from the bench. According to the Trial Court:

> This is an unfortunate case. But you have a situation where a citizen is walking down the street where she is entitled to be and someone's dog comes out and attacks her and harms her. You know, the question is, does that citizen have to bear the burden because the owner took reasonable steps to maintain that animal? I don't think that's the law.…
>
> I find that the [Smiths'] dog attacked Mrs. White when she was on a public right of way causing injury. I further find that that dog had been at large for a good period of time on that day. The dog, despite their best efforts, had been at large in the past. But the most important point is that it was at large on this occasion.
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> As to whether it had vicious propensities, to a person walking down the street, having a dog fenced in barking at them repeatedly on every occasion, it's not unreasonable for that person to conclude that that dog is vicious with respect to them. And it would be hard to believe that an owner of the dog would not or should not have known of this particular propensity of the dog toward people, pedestrians, being where they have a right to be.
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> Secondly, with respect to the at large issue. The statute says nothing about making reasonable efforts. It says nothing about using ordinary care. The statute says that a person shall not allow a dog to be at large. It doesn't say running at large, generally running at large.

> It says to be at large.… And this dog was allowed to be at large by the owner on this occasion and I think it is a case of liability.
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> For her personal injuries [Mrs. White] is awarded $15,000 and [Mr. White] is awarded $500 for loss of consortium.

Defendants appeal raising several issues. First, Defendants claim the Trial Court erred because it held them strictly liable for the dog bite. Next, Defendants claim the preponderance of the evidence weighs against any conclusion that they were negligent or negligent *per se*. Finally and alternatively, Defendants claim that the Trial Court erred because Ms. White also was negligent and the Trial Court failed to assign a portion of the fault to Ms. White consistent with comparative fault principles.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In *Alex v. Armstrong*, 215 Tenn. 276, 385 S.W.2d 110 (1964), our Supreme Court noted that the clear purpose of the statute prohibiting dogs from being allowed to run at large is "to protect persons and property from injury by dogs." *Armstrong*, 385 S.W.2d at 114. In discussing liability for violating a statute, the Court stated:

> The rules in Tennessee relating to liability for the violation of a statute have been stated as follows:
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> > "It is well settled that a failure to perform a statutory duty is negligence per se, and, if the injury is the proximate result or consequence of the negligent act, there is liability." *Wise & Co. v. Morgan*, 101 Tenn. 273, 278, 48 S.W. 971, 44 L.R.A. 548.
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> > "It has long been well settled in this State that a violation of a statute which causes injury to one within the protection of the statute is negligence per se and actionable." (citing numerous cases) *Null v. Elec. Power Board of Nashville*, 30 Tenn. App. 696, 707, 210 S.W.2d 490, 494.

> "In order to found an action on the violation of a statute, or ordinance, * * * the person suing must be such a person as is within the protection of the law and intended to be benefited thereby * * * We think that one not a beneficiary of a statute may neither base an action nor a defense on a violation thereof." *Carter v. Redmond*, 142 Tenn. 258, 263, 218 S.W. 217, 218.

Armstrong, 385 S.W.2d at 114.

The plaintiff in *Armstrong* was injured by the defendants' dog who ran into the plaintiff while playing with another dog. The defendants admitted that when they left for work, their dog was free to come and go in the neighborhood as the dog saw fit. *Id*. at 112-13. Based on these facts, the Court easily concluded that the plaintiff was within the class of people protected by the statute and that the defendants' dog was allowed to run at large. The Court noted that it was not confronted with a situation where a dog had escaped from restraint without "actual or constructive knowledge on the part of its owner that the animal was likely to escape and run at large." *Id*. at 113. The Court then noted that cases addressing what is necessary "*to allow* an animal to run at large are collected in 34 A.L.R.2d 1285, 1289." *Id*. (emphasis in original).

The A.L.R.2d annotation referenced by the Supreme Court in *Armstrong* currently states:

> **§4. Statute using word "permit" or "allow."**
>
> Where the particular statute involved provides that the owner shall not "permit," "allow," or "suffer" his animals to run at large, the courts have generally held, or recognized, that statutes of this type are not violated in the absence of at least negligence by the owner of the animals.

M.O. Regensteiner, Annotation, *Owner's liability, under legislation forbidding domestic animals to run at large on highways, as dependent on negligence*, 34 A.L.R.2d 1285 (1954 & Supp. 2004) (citations omitted).[2]

There was considerable disagreement at trial regarding whether it was Jake who attacked Ms. White or whether she was attacked by one of several other dogs in the neighborhood. In resolving this conflict, the Trial Court credited the testimony of Plaintiffs and their witnesses over that of Defendants. In *Wells v. Tennessee Bd. of Regents*, the Supreme Court observed that:

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[2] This annotation cites to no Tennessee authority specifically discussing whether a showing of negligence is a prerequisite to finding that a dog owner has violated Tenn. Code Ann. § 44-8-408 by allowing his or her dog to run at large.

> Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999).

The Trial Court made several specific factual findings including: (1) it was reasonable for Ms. White to conclude that Jake was vicious, at least as to her; (2) it was "hard to believe" that Defendants were not aware of Jake's particular propensity, or, in other words, that Defendants likely were aware of Jake's propensity towards Ms. White; (3) despite Defendants' efforts to keep Jake confined, Jake had been at large in the past; (4) Jake was at large on the day Ms. White was attacked; and (5) Jake was the dog that attacked Ms. White. After reviewing all of the relevant evidence, we cannot conclude that the preponderance of the evidence weighs against any of these factual findings. Taken together, these facts demonstrate that Defendants had constructive knowledge that Jake had both the ability and the propensity to escape and run at large. Because Defendants had at least constructive knowledge that Jake was likely to escape from time to time, we also conclude that the Trial Court correctly determined that Jake was "allowed" to be at large on the day Ms. White was attacked. It necessarily follows that the Trial Court was correct when it concluded that Defendants were in violation of Tenn. Code Ann. § 44-8-408 and negligent *per se*.

However, in phrasing the issue, the Trial Court stated: "[Y]ou have a situation where a citizen is walking down the street where she is entitled to be and … the question is, does that citizen have to bear the burden because the owner took reasonable steps to maintain that animal?" The language used by the Trial Court when phrasing the issue is unclear to us because it leads one to conclude that the Trial Court was about to find that Defendants were not negligent.[3] Such a conclusion, however, is inconsistent with the Trial Court's specific factual findings set forth immediately thereafter which demonstrate that Defendants indeed were negligent, a finding supported by the record. In other words, the Trial Court found all of the elements necessary to

[3] The proof at trial established that, unlike Defendants, many other dog owners in the neighborhood made no attempt to restrain their dog via the confines of a fence or otherwise. We can only conclude that the Trial Court used the particular language when phrasing the issue in an attempt to give Defendants some credit where credit was due.

conclude Defendants were negligent by allowing their dog to run free from time to time even though the Trial Court believed that proving such negligence was not a prerequisite to finding a violation of Tenn. Code Ann. § 44-8-408. We note that it is the "to allow" language included in the statute itself that raises the question as to whether negligence by the dog owner is required to be shown before a violation of the statute may be found. Because we affirm the Trial Court's factual findings and hold that these findings establish that Defendants were negligent in allowing their dog to run at large from time to time, we pretermit the issue of whether there can be strict liability for violating Tenn. Code Ann. § 44-8-408 in the absence of any negligent conduct resulting in a dog being allowed to run free.

The final issue before us is whether the Trial Court erred when it failed to assign a portion of fault to Ms. White consistent with comparative fault principles. This Court addressed a similar issue in *Bell v. Chawkins*, 460 S.W.2d 850 (Tenn. Ct. App. 1970), which was decided before the adoption of comparative fault in Tennessee. *Bell* involved a bicyclist who was bitted by a dog and one of the issues on appeal was whether the jury was properly instructed regarding the defense that the plaintiff had assumed the risk. We stated:

> Plaintiff, Eli Bell, admits that on occasions prior to the dog's biting his wife, he had attempted to run over it with a motorcycle and complained to defendants about the dog's being on his premises and "messing up" his shrubbery and eating food that had been put out for plaintiffs' dog. There is no evidence that Mrs. Bell on any prior occasion or until this occasion had had any encounter with the dog. Neither is it proven Mrs. Bell at any time ever harassed or attempted to entice the dog into the street.
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> Under the proof in this case we are of the opinion a charge of assumption of risk was unwarranted because plaintiff has a legal right to ride her bicycle on the public street as long as she did so in a lawful and reasonable manner. The law does not require a person to surrender the lawful exercise of a valuable right [use of a public street] or assume the risk of injury merely because someone else's conduct or failure to exercise due care threatens harm. Plaintiff is required to assume all obvious risks ordinarily incident to riding a bicycle on the public streets but she does not forfeit her right to exact from the defendant the duty to exercise ordinary care.

Bell, 460 S.W.2d at 851.

We agree with the reasoning of *Bell*. Here, Ms. White was using the street to go for a walk. Defendants claim Ms. White should be apportioned some degree of fault because she continued walking down the street once she noticed Jake was loose. While the record is unclear exactly how far away Jake was from Ms. White at that particular time, we are unwilling to hold that

a pedestrian who is exercising her legal right to walk down a public street and is doing so in a lawful and reasonable manner is required to forfeit that right simply because others have not fulfilled their statutory duty by allowing their dog to run at large. Further, we conclude that the record contains absolutely no evidence from which it reasonably could be concluded that Ms. White had engaged in any negligent conduct. Therefore, we affirm the Trial Court's judgment insofar as no comparative fault was assigned to Ms. White.

Conclusion

The Judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are assessed against the Appellants, Tucker and Lisa Smith, and their surety.

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D. MICHAEL SWINEY, JUDGE